

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of the Petition of Autotel)
Pursuant to Section 252(e)(5) of the)
Communications Act for Preemption of)
The Jurisdiction of the Arizona Corporation)
Commission Regarding Arbitration of an)
Interconnection Agreement with Citizens)
Utilities Rural Company, Inc.)

WC Docket No. 06-194

**RESPONSE OF THE
ARIZONA CORPORATION COMMISSION**

I. INTRODUCTION

On October 16, 2006, Autotel filed a Petition for Preemption of the Arizona Commission's jurisdiction pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 ("1996 Act"). In its Petition, Autotel seeks preemption of the Arizona Commission's jurisdiction over arbitration proceedings involving Autotel and Citizens Utilities Rural Company ("Citizens") claiming that the Arizona Commission failed to act to resolve the issues presented to it. Notice of Autotel's Petition was published by the Federal Communications Commission ("FCC") on October 20, 2006. The Arizona Commission hereby files its response in opposition to Autotel's Petition.

II. BACKGROUND

On March 27, 2003, Autotel filed with the Arizona Commission a petition for arbitration of an interconnection agreement with Citizens. The issues raised by the petition were resolved by the Arizona Commission in Decision No. 67273 on October 5, 2004. Autotel refuses to sign the interconnection agreement with Citizens incorporating the results of its first arbitration before the Arizona Commission.

On May 5, 2005, Autotel filed a Complaint in the United States District Court for the District of Arizona ("Federal Complaint") alleging that the Arizona Commission's Decision does not comply with the 1996 Act. Both the Arizona Commission and Citizens have filed motions to dismiss the Complaint. The Federal District Court has not yet ruled on the motions to dismiss filed by the Arizona Commission and Autotel.

On November 21, 2005, Autotel filed a Notice with the Arizona Commission for interconnection, services and network elements with Citizens pursuant to Section 252(b) of the Communications Act of 1934 as amended, and for an inquiry by the Arizona Commission to terminate the rural exemption pursuant to section 251(f)(1)(B). A Procedural Conference was held by the Arizona Commission on December 12, 2005 and a briefing schedule established. Oral argument was held on February 6, 2006, however Mr. Oberdorfer, President of Autotel, unexpectedly failed to appear. Instead, Autotel's Office Manager was present but indicated that she was not an attorney and did not understand the issues well enough to represent Autotel at oral argument. She also indicated that Autotel was satisfied with the existing record and was not object to going forward solely on the pleadings filed in the docket. Thereafter, the Arizona Commission entered a Procedural Order giving all parties until February 15, 2006 to enter objections requesting oral argument or the matter would be decided based upon the existing pleadings. No objections were filed. In Decision No. 68605, the Arizona Commission dismissed Autotel's request for a proceeding pursuant to 251(f)(1)(B) because Citizens had not invoked the rural exemption with respect to its interconnection agreement with Autotel and because Autotel refused to sign an interconnection agreement incorporating the results of the Commission's first arbitration.

On April 7, 2005, Autotel filed with the Arizona Commission yet another petition for arbitration of an interconnection agreement with Citizens pursuant to the Arizona Administrative Code and Section 252 of the 1996 Act. The Arizona Commission established a briefing schedule and oral argument was held. By Procedural Order dated July 28, 2006, the Arizona Commission dismissed Autotel's petition for arbitration. On July 28, 2006, the Arizona Commission

dismissed Autotel's third petition because of Autotel's refusal to sign an interconnection agreement incorporating the results of its prior arbitration; and because of the pendency of the Federal District Court appeal of the Commission's first arbitration decision.

On October 16, 2006, Autotel filed a petition for preemption of the Arizona Commission's jurisdiction with the FCC. Following are the Arizona Commission's comments on Autotel's petition.

III. DISCUSSION

A. The Arizona Commission Did Not "Fail to Act" Under Section 252(e)(5) of the 1996 Act

Section 252(e)(5) of the 1996 Act provides:

(5) COMMISSION TO ACT IF STATE WILL NOT ACT - If a State omission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the state commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

The FCC has entered numerous orders under Section 252(e)(5). In its review of those orders, the Arizona Commission did not find one that supports Autotel's position. In its Local Competition Order, the FCC established interim procedures to exercise its preemption authority under Section 252(e)(5). The FCC concluded in that order that it would not take an "expansive view" of what constitutes a State Commission's 'failure to act' within the meaning of Section 252(e)(5). Rather, the FCC interpreted 'failure to act' to mean a state's failure to complete its duties in a timely manner, thereby limiting preemption under Section 252(e)(5) to "instances where a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(C).

The Arizona Commission acted upon each of Autotel's filings and made a determination thereon within the time limits of Section 252(b)(4)(C). The Commission resolved all of the

issues raised by Autotel's first petition for arbitration. Autotel was apparently dissatisfied with the Arizona Commission's resolution of the issues and has since failed to execute an interconnection agreement with Citizens which incorporates the Arizona Commission's decisions. It has also filed a complaint in the Federal District Court which is still pending at this time. At least one court has found that a failure to enter into an arbitrated agreement may be construed as a failure to negotiate in good faith.

We reject SBC's suggestion that an arbitrated agreement is not binding on the parties. Absent mutual agreement to different terms, the decision reached through arbitration is binding... We also believe that, although competing providers do not have an affirmative duty to enter into agreements under Section 252, a requesting carrier might face penalties if, by refusing to enter into an arbitrated agreement, that carrier is deemed to have failed to negotiate in good faith. Such penalties should serve as a disincentive for requesting carriers to force an incumbent LEC to expand resources in arbitration if the requesting carrier does not intend to abide by the arbitrated decision.

The First Circuit Court of Appeals found that a failure to cooperate with the State commission in carrying out its function as an arbitrator (such as refusing to execute an arbitrated agreement) was tantamount to an attempt to void the terms of a valid arbitration order and may violate the duty to negotiate in good faith.

In attempting to void the terms of a valid arbitration order, it is clear that Global NAPS is refusing to cooperate with the DTE, in violation of its duty to negotiate in good faith.

Global NAPS, 396 F.3d at 25.

The Arizona Commission dismissed Autotel's second petition and request for termination of Citizen's rural exemption because Citizens never invoked the exemption in the first place. Rather, Citizens has always been willing to enter into an interconnection agreement with Autotel, but Autotel has apparently refused to sign the agreement containing the terms required by the Arizona Commission's order. In the end, the Arizona Commission determined that there was no need to undertake the 120 day proceeding requested by Autotel since the rural exemption was not raised by Citizens and Citizens expressed its willingness to enter into an interconnection agreement with Autotel.

In its Decision dismissing Autotel's second petition, the Arizona Commission admonished Autotel for its waste of administrative and judicial resources in filing another petition while its federal District Court Complaint was still pending and while it has failed to sign and operate under its arbitrated interconnection agreement.

Notwithstanding this admonishment, Autotel filed yet another petition for arbitration with the Arizona Commission shortly thereafter. The Arizona Corporation Commission once again scheduled proceedings and oral argument on the petition and pleadings of the parties. For the first time, Autotel represented that it refused to sign the arbitrated interconnection agreement with Citizens because it believed that the agreement did not comply with the Arizona Commission's decision. Autotel, however, has to-date never raised this issue in its first arbitration proceeding before the Arizona Commission. The Arizona Commission ultimately dismissed Autotel's third petition for the same reasons it dismissed Autotel's second petition. Autotel cannot go through an arbitration proceeding and then decide at the end of the day after the arbitration that it is not satisfied with the results, and then seek to start the process over again by either opting into another agreement or re-starting the arbitration process.

This is Autotel's second petition filed with the FCC in the last 4 months seeking to preempt the jurisdiction of the Arizona Commission over proceedings involving interconnection agreements between Autotel and incumbent LECs in Arizona. In its first petition, Autotel sought preemption of not only the Arizona Commission's jurisdiction, but also the jurisdiction of the Utah, New Mexico, Colorado and Wyoming Commissions in connection with the arbitration of unresolved issues arising from its interconnection negotiations with Qwest Corporation. The FCC denied Autotel's petition for preemption in a recent decision. This situation is very much like the sequence of events underlying Autotel's first petition for preemption which concerned state proceedings over interconnection issues arising between Autotel and Qwest.


Furthermore, this situation is very much akin to the one involved in Autotel's petition with the FCC to preempt the Nevada Commission's jurisdiction for failure to act under Section

252(e)(5). In denying Autotel's petition, the FCC stated:

We find the Nevada Commission's procedural dismissal satisfies its obligation to act under Section 252(e)(5). As this Commission has recognized, "a state commission carry[s] out 'its responsibility [under section 252]' when it resolves the merits of a section 252 proceeding or dismisses such a proceeding on jurisdictional or procedural grounds." The record demonstrates that in response to the arbitration petition filed by Autotel, the Nevada Commission docketed the matter, issued a public notice, held pre-hearing conferences, issued a procedural schedule, and ruled on pre-hearing issues, including SBC's motions to compel. When 'the state agency actually 'makes a determination' under Section 252- there is no statutory basis for FCC preemption.' Moreover section 252(e)(5) does not empower [the Commission] to look behind a state agency's dismissal of a carrier's claim to evaluate the substantive validity of that dismissal.' Thus, the Nevada Commission Order dismissing Autotel's arbitration petition on procedural grounds, without addressing the merits of the arbitration issues, was a final determination and cannot be deemed a 'failure to act' under section 252 of the Act.

WHEREFORE, the Arizona Commission respectfully requests that the FCC deny Autotel's petition to preempt the jurisdiction of the Arizona Commission over interconnection agreement proceedings between Autotel and Citizens. The Arizona Commission has not "failed to act" and thus there is no basis to preempt its jurisdiction as requested by Autotel.

RESPECTFULLY submitted this 20th day of November, 2006.


Christopher C. Kempley, Chief Counsel
Maureen A. Scott, Senior Staff Counsel
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007